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CURRENT TOPICS

Insanity and Crime

EMINENT as were the physicians who recently wrote to *The Times* urging a revision of the Macnaghten Rules on insanity and criminal responsibility, it seems to mere lawyers, and *a fortiori* to the uninstructed citizen, that to introduce conceptions of modern psychology and pysco-analysis into legal propositions is like piling Pelion upon Ossa. It seems to be assumed by the revisionists that there is something to revise, viz., a legal rule which must be applied in all circumstances. That this is not correct was emphasised in a letter from Mr. CONSTANTINE GALLOP, Q.C., in *The Times* of 9th September. He showed that the judges who, in 1843, were called upon in the *Macnaghten* case to answer a series of questions *in vacuo*, expressed their strong disapproval of such a procedure, and their fear that the administration of justice might be embarrassed if their answers were cited in criminal trials. The questions, he wrote, related solely to cases of insane delusion, but the Court of Criminal Appeal, more particularly, Mr. Gallop thought, during the Presidency of Lord Chief Justice Hewart, had tended to declare the law as fully and finally settled in all circumstances by the answers in *Macnaghten's* case. He pointed out that the court was not bound by its own decisions, nor was the House of Lords. The view of Mr. A. PINEY, writing from Harley Street in *The Times* of 10th September, bears out that it is a question of fact in each case. "Is there any need," he wrote, "for juries to hear more than evidence of behaviour in order to reach a decision as to the sanity or insanity of the prisoner confided to their charge? Neither psychological theories nor determinations of mental age are relevant. The cross-section of the community summoned to serve on a jury can assess the significance of conduct at least as well as can the psychiatrist. When it comes to questions of prognosis and treatment, juries may be ignorant; but pose the question, 'Is a strangler of little girls mad?' and the answer is 'Yes.' 'Is the man who, in hot blood, shoots his faithless wife mad?' 'No,' says our jury."

Rating Anomalies

THE injustices between local authorities and between groups of ratepayers arising out of the present unsatisfactory rating valuation position provided the theme for the Presidential Address of Mr. J. THOMAS JONES, delivered on 12th September to the annual conference of the Incorporated Association of Rating and Valuation Officers. He said that it was a matter of concern to local authorities that rate poundages were still linked to assessments mainly tied to values of about twenty years ago. The Minister of Housing and Local Government, when he announced the postponement of the date of completion of the rating revaluation, indicated that an inquiry into the equalisation grants question would be held. The Minister should also examine, among other questions which had a bearing on local finance, the complete or partial abolition of industrial de-rating. The rate revenue of local authorities would be augmented by about £35m. a year if industrial de-rating were abolished.

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Negligence in English and Scots Law

THE parallelism between English law and Scots law in the field of negligence has been apparent ever since the House of Lords decided *Donoghue* v. *Stevenson*, which is reported in the Scottish law reports as a Scots case ([1932] S.C. (H.L.) 70) and in the English law reports ([1932] A.C. 562) as a binding authority. The subject of reparation and the English tort of negligence is lucidly and illuminatingly treated in an article by Mr. W. A. ELLIOTT in the *Juridical Review* for April, 1952, published in Edinburgh. The writer quoted Brett, M.R., in *Heaven* v. *Pender* (1883), 11 Q.B.D. 503, 509: "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause a danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." It was a Scots case, in the House of Lords, that put the matter on the broad basis of duty to one's neighbour. "Who then," said Lord Atkin, in the *Donoghue* case, "is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." The writer deals with the effect of the *Donoghue* case in facilitating the re-introduction into the standard works on tort of the classification of the separate tort of negligence and the tendency to impose additional liability on an occupier of premises to an invitee, to be seen in *Horton* v. *London Graving Dock* [1950] 1 K.B. 412 and [1951] A.C. 737, and *M'Phail* v. *Lanarkshire County Council* [1951] S.C. 301. To all who value clarity about first principles allied to erudition we commend this admirable article.

Sir William Bruce Thomas, Q.C.

THE death of Sir WILLIAM BRUCE THOMAS, Q.C., the famous authority on railway law and for many years President of the then Railway Rates Tribunal, recalls that he spent his first years of practice as a solicitor, having been articled to Messrs. Robinson, Smith and Sons, of Swansea, and also having served with their London agents, Messrs. Riddell, Vaisey and Smith, of which Mr. George Riddell, later Lord Riddell, was then the senior partner. Upon admission Bruce Thomas accepted the position of assistant solicitor with the Great Northern Railway Company. Notwithstanding the contrary advice of friends, and particularly of Riddell, who said that it was far too risky to abandon the career of a solicitor, which already promised so much in the railway world, he was called to the bar by the Middle Temple and soon built up a highly remunerative practice. In 1932 he became President of the Railway Rates Tribunal, and, some years later, Chairman of the Charges Consultative Committee. The tribunal became the Transport Tribunal, and after nationalisation he remained President until 1950, when he resigned. He took silk in 1928, was made a Bencher in 1936, and was knighted in 1941. He was a man of serene good humour, who managed to achieve perfection in his work without the least fuss or flurry. As chairman of the public inquiry into the Transport Commission's equalisation of fares scheme in 1950, at the age of 72, he heard without strain 109 objections, and he seemed as fresh at the end of the inquiry as at the beginning. The late Sir William Bruce Thomas shed lustre on both branches of the legal profession, who mourn his loss.

Crimes on Aircraft

THE increasing heights and speeds of modern aircraft raise interesting questions of law, and especially the question of jurisdiction to try crimes committed on aircraft while in motion in the air. A crime may be commenced over the territory of one country and completed over that of another, or the aircraft may be too high in the stratosphere for it to be determined with certainty over which country it is flying. What court should try the crime, what substantive law should be applied, and should the jurisdiction be that of the flag of the aircraft, that of the State flown over when the crime was committed, or the State where the aircraft first landed afterwards? The difficulties of deciding over which country an aircraft is flying are equalled by the possible disadvantages of giving the criminal or a possible coadjutor an opportunity of choosing the venue of their trial. The matter is one for international discussion and agreement and at the conference of the International Law Association which ended on 6th September at Lucerne the matter was discussed in a report by Professor J. C. COOPER, of the United States, that (*a*) the Chicago Convention of 1944 as now in effect should be accepted as the background of the proposed new convention; (*b*) that the proposed new convention should be confined to criminal jurisdiction; and (*c*) that the convention should cover crimes committed on both civil and State aircraft. The conference agreed that the recommendations should be submitted for the consideration of the International Civil Aviation Organisation.

Qualifications for Employment

THE office boy may not always, like Gilbert's First Lord of the Admiralty, be a future partner in his solicitor-employer's firm, but if he does not drift into a different occupation, he usually becomes a managing clerk, whose position, as clients soon learn, is responsible. The choice of a candidate for that promising position has always been difficult, in spite of such visible criteria as certificates from the Royal Society of Arts and the popular Junior and Senior Oxford and Cambridge examinations. Now, if a Ministry of Education circular of 8th September is to be taken at its face value, employers will have to make up their mind on a different kind of evidence, for they are enjoined not to regard the General Certificate of Education, which has been the universal school-leaving test since 1951, as a "general passport to employment." The Minister hopes that they will "increasingly and quickly" realise that the school can provide the most complete assessment of a pupil's potentialities, and that they will require the evidence of an external examination only in subjects directly relevant to his career and future studies. The purpose of the examination, says the circular, is to testify to a degree of mastery in the subjects taken which should be secure and stable for the future. It has particular reference to university and professional qualifications, but is also adapted to school leavers of sixteen years of age and upwards who want national qualifications of suitable standards. The examination is a subject test on an optional basis, with no group requirements, and the list of subjects can be extended to meet the needs of the schools. There are two levels of papers, ordinary and advanced, and there are also scholarship papers, for the selection of pupils for university and other awards. Employers are not invited to spurn the certificate as a guide to the choice of a worker, and no doubt they will continue, as before, to rely on their native judgment, with such help as an examination result and a school record may supply.

CLAIMS FOR OWNERSHIP AND POSSESSION OF THE MATRIMONIAL HOME—I

WHEN unhappy matrimonial differences have arisen between husband and wife disputes affecting the ownership or possession of the matrimonial home are of frequent occurrence. Among the questions which arise are these: Can a husband treat his wife as a trespasser and turn her out of a house which is his sole property? Can he treat a divorced or judicially separated wife in that manner? If he is not the owner of the premises but merely a tenant can he turn his wife out of the home? If instead of trying to turn his wife out he goes away himself, can he surrender his statutory tenancy (where the premises are rent-restricted) and thereby enable his landlord to treat his wife or former wife, as the case may be, as a trespasser? Suppose the boot is on the other foot and the wife owns the house, can she eject her husband? And what of the case where the house has been conveyed into the joint names of the spouses?

Many questions of this sort, where title is in dispute, are most conveniently dealt with under the provisions of s. 17 of the Married Women's Property Act, 1882, which provides that: "In any question between husband or wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England . . . or . . . to a judge of the county court in the district . . . and the judge of the High Court of Justice or of the county court . . . may make such order with regard to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made as he shall think fit." The use of this provision in disposing of a house jointly purchased can be seen in *Re Rogers' Question* [1948] 1 All E.R. 328, in which case the wife had found the house and opened up negotiations with the vendor. She provided a deposit of £100 on the purchase price of £1,000, the balance being raised by a mortgage. Both the contract and the conveyance were in the husband's name, and he also entered into the mortgage and the indemnity policy required by the building society. The husband paid all the instalments and the interest due. Each party claimed that both had always intended that the beneficial ownership should be in himself. Giving judgment in the Court of Appeal, Evershed, L.J., said: "When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to inquire carefully, still less to agree, what should happen to the house if the marriage comes to grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself." In this case the order of Roxburgh, J., that the husband should hold the house on trust for sale and that the parties should be entitled to the proceeds of sale in the proportions of nine-tenths for the husband and one-tenth for the wife was upheld.

It has to be borne in mind in this type of case that when a husband has property conveyed into his wife's name the presumption of advancement may displace the implied trust which normally arises when X provides the money and Y takes the conveyance (see *Ducker* v. *Ducker* (1952), 159 Estates Gazette 110). The husband bought the house in 1946 and had it conveyed to the wife alone. The parties later quarrelled, and in 1949 Mrs. Ducker was granted a divorce. The husband continued to occupy the premises and made all the mortgage repayments. Mrs. Ducker claimed ownership of the house and possession against her former husband. He counter-claimed for a declaration that he was at all times beneficial owner, and for an order directing his former wife to vest the legal title in him. Pilcher, J., held that the wife was the beneficial owner and must be responsible for the mortgage payments from the date on which she left her husband, i.e., September, 1948. From this liability would be deducted a sum payable by the husband for use and occupation of the house from the same date. Judgment was given for the wife on the claim and counter-claim, and an order made for possession to be given in seven days.

It is to be observed that on a sale by a husband sole-owner a wife resident in the premises appears to have no protection. After the sale has been completed she would become a trespasser *vis-à-vis* the purchaser and could be ejected as such without any liability falling on the husband to provide alternative accommodation. In *Thompson* v. *Earthy* [1951] 2 K.B. 596 a purchaser from the husband who had deserted his wife claimed possession and damages for trespass and/or a sum for use and occupation of premises which had been the matrimonial home. Justices had ordered the husband, on his agreeing to allow his wife to remain in the home free of rent and all outgoings, to pay only £1 a week maintenance plus five shillings for each child. The wife contended that, as the purchaser knew of these matters before purchase, he took subject to her beneficial right to possession. Roxburgh, J., rejected this claim: "The real question is whether or not the wife has any legal or equitable interest in the premises which runs with the premises so as to bind them in the hands of a purchaser. I have never heard of any estate or interest in land of this character . . . The authorities suggest (though they do not decide) that there is not."

Where an owner-husband seeks to eject his wife, however, his position is not easy. It must first be said that the relationship between husband and wife is not that of landlord and tenant (*Pargeter* v. *Pargeter* [1946] 1 All E.R. 570). Even where a husband was ordered by magistrates to pay £1 12s. a week maintenance with an "intimation" that so long as he allowed the wife to remain in his freehold house he need only pay her £1 per week, there is no relationship of landlord and tenant, for that relationship requires an intention to create it and the husband was merely taking advantage of what the magistrates had suggested and not altering the legal relationship already existing (*Bramwell* v. *Bramwell* [1942] 1 All E.R. 137 (C.A.)). That relationship is usually described as one of licensor and licensee, though Denning, J., denied this in *Old Gate Estates, Ltd.* v. *Alexander* [1950] 1 K.B. 311, at p. 319, and his view was adopted by Roxburgh, J., in *Thompson* v. *Earthy*, *supra*. But, even so, a husband cannot terminate the licence and sue his wife for possession as a trespasser. And this is so even though there has been a decree of judicial separation (*Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792), for the husband cannot at common law sue his wife in tort, and s. 12 of the Married Women's Property Act, 1882, expressly provides that, except that a wife can sue her husband for the protection of her own separate property: "No husband or wife shall be entitled to sue the other for a tort." His only remedy is an application for possession under s. 17 of the Act, on which application the court has a discretion and will take into account such factors

as whether the wife has behaved properly, the relative means of the parties, the need for a home for any children of the marriage custody of whom may be given to the wife, any offer of alternative accommodation made by the husband, and so on. The fact that the wife has possession of the house should be taken into account by the registrar in fixing permanent alimony.

That an order for ejectment *can* be made under s. 17, even though it may involve actual physical ejectment of the wife, can be seen from *Stewart* v. *Stewart* [1948] 1 K.B. 507. The court there upheld an order for possession in two months made against a wife by a county court judge. It was argued for the wife that such an order necessarily involved an interference with the wife's enjoyment of the matrimonial home to which, as a wife, it was contended, she continued to be entitled. Although such an order can be made it will be well to consider the following passage from the judgment of Tucker, L.J.: "There is jurisdiction in the county court judge under this section to make an order for possession at the instance of husband or wife against the other spouse, but the cases show that, whether in that or some other form of proceeding, the court will be very slow to make any order dealing with the legal rights of the parties which might have the effect of depriving either the wife or the husband of her or his right to occupy the matrimonial home. The cases show that, whether it is an injunction that is being granted or some other form of relief, great care must be taken in a normal case where there is a subsisting marriage between husband and wife, the parties hitherto living together, and no order having been made by the Divorce Court or by justices giving the one the right to live apart from the other, to see that the rights of the wife or the husband should be safeguarded in the form of the order made . . . The rights of one spouse as regards the matrimonial home as against the other may vary with the circumstances of each case, and, although it is, no doubt, the duty of the husband to provide somewhere for the wife to live until the decree is made absolute, it does not necessarily follow (in fact in many cases it would be very inconvenient and embarrassing) that she should be sharing rooms under the same roof as her husband. In the present case it was pressed on the learned judge that he should not make an order for possession except on the terms that it was not to take effect unless and until the husband had provided other accommodation elsewhere for the wife. That is an order which he might very well have made." Such an order was in fact made in *Cristel* v. *Cristel* [1951] 2 K.B. 725, where a consent order for possession was made against a wife, suspended "until the husband should provide suitable alternative accommodation—a house or a bungalow." A subsequent attempt by the husband to vary this order by including the words "or a flat" was rejected by the Court of Appeal. An interesting case on the position where there are "separate households" under one roof is that of *Davey* v. *Leonard* (1951), 95 SOL. J. 284. The divorced wife, who lived under the same roof as her former husband but separately with common user of parts of the house, invited her brother to live with her. The former husband was tenant of the whole house, and sued for ejectment of the brother as a trespasser. The county court judge held that trespass would not lie as he was there on the wife's invitation. The Court of Appeal refused to interfere, Somervell, L.J., saying: "This is one of those rare cases in which a husband has been found guilty of desertion though living under the same roof. If there were two households that would mean that she would have exclusive control of the rooms in which she lived. It seems to me that there was evidence on which the county court judge could find as a fact that the rights of the wife in her separate part of the house were similar to those of a tenant, namely, that she had exclusive possession and had the same rights as she would have had if she had been tenant. There being evidence on which the county court judge could so find, this court will not interfere."

A novel argument on s. 17 was recently raised in the Court of Appeal in *Lee* v. *Lee* [1952] 1 T.L.R. 968. Mr. Lee owned the house from which he deserted his wife and three children, and an order was made by justices in her favour. The county court judge granted an application by the wife under s. 17, and delivering the judgment of the Court of Appeal Somervell, L.J., said that the appellant's argument was that, although the words of s. 17 are discretionary, that discretion ought not to be regarded as available in a question of title. "If the question is one of title it must be decided so far as possible according to evidence as to whom the property belongs. But that does not seem to me to be this case. The county court judge has accepted the position that the title is the husband's." It was argued that there was no jurisdiction to interfere with proprietary rights, though counsel admitted that a judge could make an order dealing with possession. "I would be exceedingly unwilling, unless I was forced by some words in the statute or some authority, to come to the conclusion that the county court judge could not do what he did in this case . . . So far from finding anything in the statute to preclude him from doing what he has done, the words of the statute are in the widest possible form—the court can make such order as it thinks fit with regard to any question between husband and wife as to the title or possession of property."

In *Ferris* v. *Weaven* (1952), 96 SOL. J. 414, an attempt was made to evade these difficulties by a collusive sale for a fictional consideration. Mr. Weaven had deserted his wife in 1941 and had written that he would continue to pay the mortgage so long as Mrs. Weaven left him alone. She could remain in the house and use his furniture. Mrs. Weaven received no maintenance, and in July, 1951, received a letter from solicitors asking her to vacate. She obtained an order from magistrates in September, 1951, on the grounds of desertion and wilful neglect to maintain. At the hearing it was admitted that Mr. Weaven had sold the house to his brother-in-law, Mr. Ferris, for £30 (which had not been paid), because he thought he would then be able to get possession. Jones, J., held that Mrs. Weaven had a contractual licence, arising from Mr. Weaven's letter, to remain in the house and that this licence bound any subsequent purchaser in equity except a *bona fide* purchaser for value. Mr. Ferris thus bought subject to Mrs. Weaven's licence and the claim for possession failed.

The equitable nature of a wife's rights in the matrimonial home was also emphasised in *Bendall* v. *McWhirter* [1952] 1 T.L.R. 1332; *ante*, p. 344. Mr. McWhirter deserted his wife in 1950, leaving her in the matrimonial home and saying: "You can have the house and furniture." She obtained a maintenance order of £3 per week from the magistrates. In 1951 her husband became bankrupt, and Mr. Bendall became trustee in bankruptcy. He asked Mrs. McWhirter to vacate the premises in order that they might be sold for the benefit of the creditors. In the Court of Appeal, Denning, L.J., said the wife's position was that of a licensee with a special right under which her husband could not turn her out except by an order of the court. This right was valid, if not in law, at any rate in equity, against the successors in title of the licensor including his trustee in bankruptcy. Hence the claim for possession failed.

Of course, once the parties have become divorced, the wife is in the position of a trespasser if she remains in the husband's house. It would appear, however, from *Hichens* v. *Hichens* [1945] 1 All E.R. 451 (C.A.) that proceedings under s. 17 of the Married Women's Property Act, 1882, which were instituted after decree *nisi* but before decree absolute can be carried to their conclusion by an order, even though the parties are no longer husband and wife, which was the fact which founded the jurisdiction under s. 17. The court may take into account the fact that there has been a dissolution on receiving the registrar's report on an inquiry made under s. 17 and before deciding upon the order to be made.

Although a husband could not sue his wife in tort and could not obtain an injunction, presumably, to restrain her from entering his house solely on the grounds that it is his house and that in entering it against his wishes she would be committing a trespass, it appears that by virtue of s. 12 of the Married Women's Property Act, 1882, a wife *can* obtain such injunction. This section provides that: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort." In *Boyt* v. *Boyt* [1948] 2 All E.R. 436 (C.A.) the wife owned the house and had filed a petition on the ground of cruelty. The husband had possession of the children and had left the matrimonial home. When he announced his intention of returning she applied to Barnard, J., for custody of the children and an injunction to restrain the husband from entering the matrimonial home pending the hearing of the petition. Barnard, J., refused both applications. The Court of Appeal reversed this decision, Tucker, L.J., saying: "It seems to me that the case really resolves itself into this: What in the circumstances is the best for the children, having regard to the fact that the wife is the owner of this house, and *prima facie* entitled to occupy it and live there?" And he decided that the proper place for the children pending suit was with their mother in the matrimonial home.

The principles upon which such an injunction will be granted can be further observed in *Shipman* v. *Shipman* [1924] 2 Ch. 140, in which case Atkin, L.J., said this: "It is the duty of husband and wife to live together and if one or other wilfully absents himself, that is a matrimonial offence, and if a wife, without good cause, seeks to exclude her husband from the matrimonial home, she seeks to get the court to enable her to evade a duty. Therefore, I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a stranger. So perhaps in normal circumstances the husband may have a right to enter the matrimonial home for duties which it is not only his right to demand but his duty to render, and under these circumstances, the husband would be guilty of no misconduct if his innocent presence did some damage, and I think the wife would have no claim. *But such a right of the husband would be limited to being on the premises to enjoy the matrimonial consortium*, and, if the husband were guilty of conduct which would be ground for a petition by the wife, or would enable her to resist a petition for restitution of conjugal rights, the effect would be that he would forfeit the privileged position he held previously and would be relegated to the position of any other person. In no circumstances would he have the right to interfere with the rights of the wife in a way detrimental to her separate property."

The implications of the passage italicised in the above quotation may be seen from *Symonds* v. *Hallett* (1883), 24 Ch. D. 346. In that case a leasehold house and contents had been settled on the plaintiff wife for her sole and separate use and enjoyment for life. Difficulties arose and the wife filed a petition on the grounds of cruelty and adultery and claimed an injunction that her husband, "his servants or agents, might be restrained from entering upon or taking or continuing in possession of the leasehold house, and from removing or causing to be removed any furniture," etc. The husband had ceased to reside in the house some twelve months back, except that he usually stayed there on Thursdays and Fridays, and slept there one night a week. He had already removed some of the furniture. The Court of Appeal upheld the granting of an interim injunction by Chitty, J. The husband did not wish to use the house for the purpose of associating with his wife but merely to live there on certain days of the week. The court decided that, in the circumstances, the most convenient thing was to continue the injunction until the hearing. Cotton, L.J., however, said: "It must not be supposed . . . that I look with the slightest favour on the contention of the plaintiff's counsel that there is a right in the case of a married woman, being entitled to and living in a house settled to her separate use, to come to a court of equity to restrain her husband at her will and pleasure from entering there . . . Undoubtedly courts of equity [will interfere] as regards protecting the property against interference by the husband if he wishes to deal with it as his property, and to deprive the wife of the property in it . . . But where it is not interference with property . . . it is a very different thing to say that she, a married woman, can insist on a court of equity preventing her husband entering the house. To say that she is a *feme sole* is a mere hypothesis and an imagination, because she has a husband, though as regards property she is to be considered as a *feme sole*."

It would appear, however, from the recently decided case of *Teakle* v. *Teakle* [1950] W.N. 452 that there is another ground, other than the protection of a wife's property, on which the court will eject the husband from the wife's house whilst the marriage is still subsisting—and that is the desirability of preventing a husband from bringing pressure to bear on his wife to induce her to abandon her petition by taking possession of the premises and excluding her therefrom. In the case referred to the property had been settled by the wife's father on trust for the wife for life and, on her death, for her husband. In June, 1950, the wife left the matrimonial home, taking with her the two children of the marriage, and in her petition, subsequently filed, she said she had left because she was frightened of her husband's cruelty. Later the husband left the home in order to facilitate certain financial negotiations which his brother was conducting with the wife's father, and the wife and the children then took up residence again in the matrimonial home. A month later the wife learned that the husband was intending to return and immediately left the house. The husband, by affidavit, denied the allegations of cruelty and stated that he hoped his wife would return and that the marriage would be preserved. The wife applied for an injunction restraining the husband from visiting the premises and residing therein during the pendency of the suit. Pearce, J., said it was clear that the husband knew that his wife wished to return to her house, and that during the pendency of the petition she could not return so long as he was there. It was also clear that the husband wanted the wife to drop the charges which she was making and return to him. The court, however, had a duty to see that people were able to bring petitions without unfair pressure being put on them which might cause them to drop a legitimate case, and he granted the injunction.

G. H. C. V.

DEVELOPMENT PLAN INQUIRIES—I

In articles at 95 Sol. J. 424, 439 and 458 (reproduced as No. 26 in the series of "Oyez Practice Notes"), the composition of a development plan under the Town and Country Planning Act, 1947, was discussed and advice given on the making of objections. The present article is intended to give some idea, first, of the actual mechanics of a particular development plan inquiry and, second, of some of the substantive points and difficulties arising, together with one or two criticisms of the procedure.

The article is based on a substantial inquiry, which lasted for four weeks, held as the result of some 340 objections being received to a county development plan composed of a county map and four town maps, together with a designation map relating to numerous widely scattered properties.

As a preliminary point, it must be emphasised that the description of one of these inquiries as a development plan inquiry, while convenient, is a misnomer, for the inquiry is not into the plan but into the objections and representations received by the Minister with regard to the plan. From this it follows that the local planning authority do not have to justify the plan as a whole, and those items in the plan to which no objection or representation is received are not in issue and need not be mentioned.

It may, of course, be that the Minister will disapprove a proposal in a plan to which no objection is received. In fact, his consideration of a plan is based partly on an examination of the whole plan by his technical officers, assisted no doubt by reports from interested Government departments such as the Ministry of Agriculture and Fisheries, and partly on the report of his inspector, whose duty it is to assess the merits of each objection in relation to the plan.

The former Ministry of Town and Country Planning dealt with the procedure at a public local inquiry into a plan in their circular No. 95. The circular emphasised that persons appointed by the Minister to hold public local inquiries exercise a wide discretion as regards the receiving of evidence and the order in which it is submitted. While not limiting this discretion the circular indicated the procedure which the Minister considered appropriate for securing that objections are properly investigated. The circular indicated that this procedure would comprise three main stages, namely:—

(1) An opening statement by the local planning authority's representative.

(2) Presentation of objectors' cases.

(3) A final review by the authority's representative of the questions discussed at the inquiry.

The opening statement at stage (1) would, the circular said, as a rule deal mainly with policy and matters of general interest and would include the giving of evidence in support of the statement, but cross-examination of the authority's witnesses would be limited to matters of general interest. Stage (2) would enable objectors to present their case in detail with cross-examination of the authority's witnesses as to detail. It would enable the authority to answer the objection in detail and afford the objector an opportunity of summing up his case.

This procedure is based upon that which was used in connection with orders under Pt. I of the Town and Country Planning Act, 1944, declaring land to be subject to compulsory purchase for dealing with extensive war damage or for the relocation of population and industry. In the case of such orders the property concerned was all located within a comparatively small area to be dealt with as a whole, where the general principles of the authority's case would apply to all the objections and where the objectors might well have a common interest. It is not altogether a happy choice for an inquiry where the authority's proposals and the interests of objectors may have no connection with each other. For instance, an objector whose land is affected by a school site allocation in a town may well have no common interest with an objector to a proposed by-pass road for the same town. Where the development plan is a county one with a county map covering most of the county and town maps for towns many miles apart, it can well be appreciated that most objections, subject to what is said later about the grouping of objections, will have nothing in common.

Where there is thus a lack of common interest stage (1) of the Ministry's procedure becomes something of a formality, while stage (3) is useless and redundant, and it is only stage (2) that really matters. It is clear that with a large inquiry each objection, or group of objections having a common interest, should as it were form the subject of a little separate inquiry on its own. This has the added advantage that each objector and his advocate and witnesses need only attend when his objection is due to come on.

If objections are to be classified in this way and heard in their appropriate classification, it is necessary to produce a list showing the order in which they will be heard, so that all parties can form some reasonable estimate of when their cases will come on. At the inquiry referred to at the beginning of this article the list was prepared by grouping the objections first according to the map to which they related. The objections within each of these main groups were then subdivided according to the proposal in the particular map to which they related, e.g., all objections to a particular new road proposal were bracketed together, as were a number of objections to a proposed bus station; this left within each main group a number of individual objections not connected together by subject-matter. The main groups were placed in order so that objections to the county map were taken first, then objections to the town map relating to the town farthest from that in which the inquiry was held, and so on. Within each main group the sub-groups and individual unconnected objections were listed in order of the standing of the advocates concerned, so that sub-groups or objections in which counsel were appearing came first according to the seniority of counsel, then those in which solicitors were appearing, then those in which other professional representatives were appearing, and, finally, those of objectors in person. The order of priority of a sub-group was determined by the seniority of the leading advocate, and once a sub-group came on all objectors in that sub-group were heard, however represented, in priority to the next sub-group. Individual unconnected objections in which the same advocate was appearing were, as far as possible, kept together so that his cases came on one after the other.

By sending a circular letter to all objectors or their professional representatives before the opening of the inquiry asking by whom their objections would be presented, the local planning authority were able to submit a complete draft list to the inspector for his approval at the opening of the inquiry, duplicated copies of which were made available to objectors. The authority also appointed an appearance officer, with whom objectors could get into touch personally or by telephone from time to time to find out how the list was progressing and who was responsible for warning them when their cases would shortly be coming on. Some elasticity in the list was allowed by the inspector between sub-groups

though not between main groups, but this was not encouraged; the difficulty of altering the place in the list of an objection in a sub-group is appreciable as it affects the other objections in the sub-group also.

These arrangements, with co-operation on the part of the authority and the objectors' representatives, seemed to work very well and resulted in the minimum waste of "waiting" time to all.

It has already been announced that, owing to the large number of objections received to the London County Council's development plan and the wide range of proposals covered, the objections will be classified in lists and heard accordingly, so that it may well be that in the case of the inquiry into this plan and also other large plans, such as Middlesex, something on the foregoing lines will be arranged.

As to the procedure at the inquiry itself, it has already been mentioned that at a large inquiry stage (1) in the Ministry's circular is a formality. At the inquiry referred to in this article, the local planning authority's representative gave a short history of the preparation of the plan, and stated the number of objections received, settled and outstanding, with one or two remarks as to apparent misconceptions by objectors as to the nature of the plan. The county planning officer was then tendered formally as a witness by asking him to confirm the opening statement, but there was no general cross-examination. The details of individual objections were not touched upon, and there was in reality no necessity for an objector to be present.

The inquiry then got down to the substantive business of hearing objectors and proceeded in effect as a series of planning appeal inquiries, each objection being taken as follows:—

(1) Opening by objector's representative.

(2) Objector's witnesses examined, cross-examined and re-examined.

(3) Local planning authority's witnesses examined, cross-examined and re-examined.

(4) Speech by authority's representative ((3) and (4) could, if desired, be transposed).

(5) Reply by objector's representative.

In the case of objections in sub-groups, all the objectors' cases were opened and their witnesses called before the authority's case was started. Where the objections cover common ground, it may often be unnecessary for objectors after the first to do much more than concur in what has been said on behalf of the first, and similarly one cross-examination of the authority's witnesses may substantially suffice, although all are entitled to cross-examine; it is only a waste of time for the same points to be made over and over again by different objectors in the sub-group.

The only objection to this procedure is that the objectors have to open their cases without the full details of the authority's case, though the substance of this may often be apparent to the objectors from the plan itself and local knowledge, and particularly from the written analysis of the survey where this has been made available by the authority.

In practice there seem to have been variations in the procedure adopted at different inquiries, whereby, for instance, the authority's witness gives evidence in chief before the objectors' cases are opened. The procedure set out above in the last paragraph but one seems, however, to be quite satisfactory and substantially in accord with stage (2) of circular No. 95; although it may leave the objector initially in ignorance of the full details of the authority's case, it does give him the last word.

At the particular inquiry referred to in this article no final reply was made by the authority as suggested in circular No. 95, and consequently once an objector's case had been finished there was no need for his representative to attend again at the end of the inquiry.

It is quite general practice for written proofs of evidence to be handed to the inspector, with copies for the opposing party or parties, and read by the witnesses.

In view of the variations in procedure at different inquiries it may be well to inquire of the clerk to the local planning authority shortly before the inquiry what procedure is to be adopted; it will be useful to attend on the first day of the inquiry to see what procedure is being used. To find that there is a different order of evidence or speeches in the presentation of a case from that expected can be a little upsetting. It will also be useful to find out, if possible, what other objectors are grouped together with one's own client, and by whom they are being represented; it will then be possible to confer together and decide on the parts to be played in the presentation of the various objectors' cases, so as to avoid unnecessary duplication of evidence and statements and the consequent waste of time and energy.

The second part of this article will deal with some of the substantive points and difficulties which arise.

R.N.D.H.

WORKMAN LENT BY EMPLOYERS

THE question as to whether a workman who has been lent by his general employers has come into the relationship of master and servant with the employer to whom he has been lent was the subject of an interesting decision this year in *Garrard* v. *A. E. Southey & Co. and Others* [1952] 1 T.L.R. 630; 96 SOL. J. 166. The first defendants employed the plaintiff as an electrician, and agreed to hire the plaintiff and other workmen to the second defendants for installing electrical equipment in certain factory premises under construction. The workmen so lent to the second defendants brought their small tools with them, and the second defendants' foreman told them that they could have all the tools and materials they wanted out of his maintenance stores. He also told these workmen, when they asked for a ladder or trestle, that they should look around and find them. On 20th April, 1949, the plaintiff took a pair of builders' trestles, which he found in the factory premises, to fix tubing along the roof. In coming down he held on to the top rung of the trestle, and it came away in his hand, so that he fell backwards and suffered injuries. The plaintiff claimed damages for injuries and loss sustained through the negligence of both defendants.

Before stating the decision in the above case, let us examine the situation which may arise when a workman is hired by his general permanent employer to another employer for the purpose of carrying out certain work. A somewhat pessimistic view of determining what is the test to be applied in these cases was expressed by the Lord Justice-Clerk (Cooper) in *Malley* v. *London Midland and Scottish Railway Co.* [1944] S.C. 129, at p. 136: "Repeated efforts have been made to formulate concisely what has been described as 'the test' to be applied in determining whether a person who is in the general employment of A should be treated for some purpose as the servant of B. The shifts of emphasis in these different formulations, the judicial criticisms to which many of them have from time to time been subjected, and the fact that the practical problem persistently recurs without seemingly becoming any easier of solution, afford one more illustration of

Lord Macnaghten's observations in *Foxwell* v. *Van Grutten* [1897] A.C. 658, at p. 671, that it is one thing to put a rule of law in a nutshell and another thing to keep it there."

However difficult it may be to ascertain " the test " and keep it in the metaphorical nutshell when discovered, there are certain factors which may be either eliminated or relegated to their proper place when attempting to prescribe any formula of general application. Thus, the consideration for lending a servant has nothing to do with the principle on which a servant must be held to be in the employ of one or the other master. Again, the fact that one employer selects the servant and pays his wages and has the power to dismiss him are important matters, and, *if nothing else intervenes*, are strong evidence to show that he is the servant of that employer. The general proposition—subject to the usual refinements which are inevitable in the law applicable to these cases—is that the person responsible as master is the person who has a right at the moment to control the doing of the act.

In the old case of *Quarman* v. *Burnett* (1840), 6 M. & W. 499, which has always been treated as a guiding authority, the defendants owned a carriage, but habitually hired from a jobmaster horses to draw it; the jobmaster also supplied a regular driver who wore a livery provided by the defendants. It was decided that the defendants were not liable for the results of the driver's negligence in leaving the horses unattended. The ground of the decision was that the defendants had no control over the way in which the horses were handled, though they could direct the driver where and when to drive.

In *Donovan* v. *Laing, Wharton & Down Construction Syndicate, Ltd.* [1893] 1 Q.B. 629 (C.A.) the defendants lent a crane, with a man in charge named Wand, to a firm called Jones & Co. for the purpose of loading a ship from a quay. The plaintiff, who was a workman in the employment of Jones & Co., was employed by them to give directions to Wand, who was in charge of the crane, and the plaintiff's duty was to stand at the edge of the wharf and give the signals for the crane to be set in motion for the purpose of lowering the chain, raising the goods when attached to the chain from the wharf, and lowering them into the hold. While the loading was going on, Wand on one occasion did not wait for the signal from the plaintiff, but caused the crane to swing round towards the wharf, and, in so swinging round, it struck and injured the plaintiff. At the trial the jury found that the injury to the plaintiff was due to negligence on the part of Wand, but the learned judge entered judgment for the defendants upon the ground that Wand was, for the purposes of these operations, the servant of Jones & Co. and not of the defendants. That decision was upheld by the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.). In the course of his judgment (at pp. 632, 633) Lord Esher, M.R., pointed out that for some purposes, no doubt, the man Wand was the servant of the defendants. Probably if Wand had let the crane get out of order by his neglect, and in consequence anyone was injured thereby, the defendants might be liable. But the accident in this case happened from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire control of Jones & Co.

In all such cases it is important to remember that the burden of proof rests on the general or permanent employer to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. The burden is a heavy one and can only be discharged in quite exceptional circumstances—see *per* Viscount Simon, L.C., in *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool), Ltd., and Another* [1947] A.C. 1, at p. 10. In that case the appellant board, who were the harbour authority, owned a number of mobile cranes, each driven by a skilled workmen engaged and paid by them for the purpose of letting out the apparatus so driven to applicants who had undertaken to load or unload cargo at Liverpool Dock. The respondent company were master stevedores who hired from the appellants the use of a portable travelling crane, together with its driver, one Francis Newall, for the purpose of loading a ship at one of the docks belonging to the appellant board. The general hiring conditions stipulated that cranemen so provided should be the servants of the hirers. A man named James MacFarlane was a registered checker employed by the forwarding agents who had engaged the respondent company as stevedores to load the cargo on the ship. MacFarlane was engaged in checking certain goods which were in course of being transferred from shed to ship by means of the crane, which did not run on fixed rails, but could be moved in any direction by the crane driver. The crane, which was standing in the dock shed, had picked up, under MacFarlane's direction, a case of which he had to note the number and marks. While he was endeavouring to do so, instead of further movement of the crane being stopped till he could take the particulars, it was set in motion and driven by Newall. The result was that MacFarlane was trapped and struck by the crane and seriously injured, and he brought an action for damages against the respondent company and in the alternative the appellant board.

From the evidence it appeared that the appellant board had engaged Newall, paid his wages, prescribed the jobs he should undertake and alone had power to dismiss him. The respondent company had the immediate direction and control of the operations to be executed by Newall with the crane, e.g., to pick up and move a piece of cargo from shed to ship, but had no power to direct how he should work the crane, the manipulation of the controls being a matter for him. It was held by the House of Lords (Viscount Simon, L.C., and Lords Macmillan, Porter, Simonds and Uthwatt) that the harbour authority (the appellant board), as general permanent employers, were liable, not having discharged the heavy burden of proof so as to shift to the stevedores (the respondent company) the board's *prima facie* responsibility for the negligence of the craneman, who in the manner of his driving was exercising the discretion the board had vested in him. Furthermore, the question who was the employer responsible for his negligence was not determined by any agreement between the harbour authority and the stevedores. In commenting upon the application of " the test " in these cases, Viscount Simon, L.C., said (at p. 12): " I would prefer to make the test turn on where the authority lies to direct, or to delegate to the workman, the manner in which the vehicle is driven. It is this authority which determines who is the workman's 'superior.' In the ordinary case, the general employers exercise their authority by delegating to their workman discretion in method of driving. . . . If however the hirers intervene to give directions as to how to drive they have no authority to give, and the driver *pro hac vice* complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tort-feasors." And Lord Macmillan (at p. 13) put the case in point in these words: " The stevedores were entitled to tell the driver where to go, what parcels to lift and where to take them, that is to say, they could direct him as to what they wanted him to do; but they had no authority to tell him how he was to handle

the crane in his work. In driving the crane, which was the appellant board's property confided to his charge, he was acting as the servant of the appellant board, not as the servant of the stevedores. It was not in consequence of any order of the stevedores that he negligently ran down the plaintiff; it was in consequence of his negligence in driving the crane, that is to say, in performing the work which he was employed by the appellant board to do."

Reluctant as we are to introduce refinements, there may nevertheless be a subtle distinction between the hire of a servant and the hire of his services. By way of example, it may be useful to refer to *Chowdhary and Another* v. *Gillot and Others* [1947] 2 All E.R. 541. In that case the plaintiffs, a doctor and his wife, were injured in a collision between a motor car and a lorry. The doctor, the owner of the car, had left it with Daimler Company, Ltd. (the second defendants), for repairs, and, on his asking the company's receptionist if he could have a "lift" to the nearest railway station, Gillot, the first defendant, who was employed by the company, was instructed to drive him and his wife to the station in his (the doctor's) own car. On the way to the station the car collided with a lorry driven by Jones, the third defendant. Streatfeild, J., found that the defendant Gillot had been guilty of negligence and that the accident was due solely to his negligence. Further, the learned judge, applying the *Mersey Docks and Harbour Board* case, *supra*, held that Gillot was, at the time of the accident, the servant of the Daimler Company, Ltd. The ground of the decision was that, having received the car for repairs, the company were, at the time of the accident, in possession of it as bailees and, as long as the bailment continued, the owner had no right to control the bailees' servant; the company had lent the plaintiff the services of their servant and had not transferred the servant himself to the plaintiff; and, accordingly, the driver did not at common law become the particular servant of the plaintiff.

Returning now to the case which gave rise to our investigations, namely, *Garrard* v. *A. E. Southey & Co. and Others*, *supra*, Parker, J., pointed out that in nearly all the authorities on the point in issue it was a third party who had been injured by the lent workman. His lordship was not convinced that the approach to the problem was necessarily the same in the present case, where it was the workman himself who had been injured. In the present case the person to whom the workman was lent was himself the occupier of the factory providing all the tools and equipment and devising the system of work. Again, it seemed to the learned judge that there was a distinction between cases where complicated machinery and a driver were being lent, and the present case where labour alone, and not necessarily highly skilled labour, was lent. It was easy to say that the general employer did not intend the hirer to have control over his valuable machinery in the sense of being able to tell him how to work it. But where it was a matter of labour only, it was much more easy to infer that the hirer should not only control the workman by telling him what work should be done, but also the manner of doing it. Here what was done went far beyond general control. The relationship of master and servant was, in the view of the learned judge, here established between the second defendants (the hirers) and the plaintiff. On the facts, the second defendants had been guilty of negligence and judgment was given against them, the claim being dismissed as against the first defendants.

M.

Procedure

XX—SOME RECENT ENFORCEMENT CASES

A COMPARATIVELY high proportion of modern cases on procedural topics is concerned with problems of execution and other means whereby the important and often difficult matter of obtaining satisfaction of a judgment is sought to be achieved. We select for comment three recently reported examples of obstacles which judgment creditors have found in the way of prompt collection of their judgment debts.

In two of the cases the amount owing to the creditor represented the creditor's costs of divorce proceedings. As a matter of principle this feature would be immaterial, since ordinary costs awarded in proceedings are recoverable, subject to taxation, in the same way as other sums of money included in a judgment. In *Boon* v. *Boon* [1952] 1 T.L.R. 764, however, the effect of a statutory provision which in its language differentiated between a debt and "costs of suit" was held to be to disentitle the creditor to pursue the particular remedy she had chosen for the enforcement of her judgment for costs.

This result was brought about in the following circumstances. A wife, having obtained an order for payment of £59 5s. as taxed costs, issued a judgment summons in respect of the non-payment of the whole of this sum. Such a judgment summons invokes the court's discretionary power under s. 5 of the Debtors Act, 1869—a jurisdiction that is exercised in divorce matters by a judge of the Probate, Divorce and Admiralty Division. The summons calls upon the judgment debtor to appear and be examined on oath touching his means to pay the debt. Now the husband in this case was an airman of the regular forces, and accordingly the provisions of s. 144 of the Air Force Act, 1918, were applicable. That section, which corresponds exactly with a similarly numbered section in the Army Act, 1881, besides protecting from seizure in execution the pay, clothing and regimental property of the serviceman, as is well known, provides that his personal service in the forces shall not be subject to interference by civil process for small amounts. Subsection (1) enacts that an airman shall not be taken out of Her Majesty's Services by any process, execution, or order of any court of law or otherwise, or be compelled to appear in person before any court of law except in respect of two matters, namely, a criminal charge or conviction, or "on account of any debt, damages, or sum of money, when the amount exceeds £30 over and above all costs of suit."

It will be seen that the validity of the summons in the present case depended on the question whether its subject-matter came within the second of these exceptions. The amount covered by the summons certainly exceeded £30, but that amount was itself, so the husband contended, "costs of suit," there being no sum of money "over and above" the costs of suit. For the wife the argument was that the costs should be regarded as a debt for the purpose of s. 144 (1), and that "costs of suit" meant in the circumstances the costs of the separate suit constituted by the judgment summons, and not the costs of the divorce suit. The husband's rejoinder was to the effect that a judgment summons was a form of execution and not a separate suit, so that "costs of suit" must mean the costs of the suit in which the execution was taken out.

In deciding in favour of the husband's contention, Collingwood, J., applied a decision of the Court of Common Pleas in *Flanders* v. *Nicholls* (1737), Barnes 433, which dealt

with similar words in an early Mutiny Act. There, however, there was an original debt, less in amount than the current limit of the exception, and also a sum of costs which brought the total amount due beyond that limit. The creditor sought to roll these two amounts into one by bringing a fresh action on the judgment, but the court ordered delivery up of the bail-bond, thereby giving the defendant soldier the benefit of the Act, and implying that in computing the amount of the debt in order to discover whether it came up to the statutory minimum only the original debt was to be included. Accordingly, the present case, where there was no debt apart from the costs of suit, was within the prohibition of s. 144 and not within the exception.

The form of execution adopted by the creditor for costs in *Waight* v. *Waight and Walker* [1952] 2 T.L.R. 177 was the issue of a writ of *fi. fa.* against the goods of the judgment debtor. Again, this is a proceeding in the original suit, and in matrimonial matters is issued out of the Divorce Registry. Should the goods seized be claimed by a third party, as happened in this case, and interpleader proceedings follow, these are heard in the first place by a registrar. The question of the correct procedure to be followed if a party to the interpleader proceedings desires to appeal against the registrar's decision was one of the points dealt with in the judgment of Collingwood, J. For the case is reported on appeal from such a decision of the registrar, and on behalf of the creditor a preliminary objection was taken that the appeal should have been to the Divisional Court. Similar matters in the Queen's Bench Division are determined by a master, subject to appeal, under R.S.C., Ord. 54, r. 22A, direct to a Divisional Court. But the Rules of the Supreme Court apply to proceedings in the Divorce Division only to the extent mentioned in r. 80 of the Matrimonial Causes Rules, 1950, which itself opens with the words: "Subject to the provisions of these rules." And r. 59 of the M.C.R. provides that an appeal from an order of a registrar may be made on summons to a judge in chambers. Therefore Collingwood, J., decided that he had jurisdiction to hear the summons in chambers, though he delivered his judgment in open court.

On the merits of the case, the learned judge declined to disturb the registrar's decision in the claimant's favour. He dealt further with a point which is of some general interest as a broad comment on the scope of the Bills of Sale Act. The property in dispute was a motor car which had been pledged to the claimant as security for an existing debt and for prospective further advances. To the contention that this transaction, not having been registered as a bill of sale, was void, his lordship answered: "In my opinion, this transaction was not affected by the Bills of Sale Acts. This was a simple pledge in which immediate possession of the car was transferred to the pledgee and the transaction was complete without any writing, and the fact that the registration book was also handed over does not bring it within the Acts. . . . The Acts have no application to a pledge as distinguished from an assurance or licence to take possession. The Acts are aimed at documents, not at transactions. They do not forbid a loan on the security of chattels; they merely provide that, if the transaction be recorded in writing, it shall be void unless made in the prescribed form and registered."

The third recent case to which we propose to draw attention raised again one of the most frequently litigated questions in garnishee law, namely, whether a particular sum of money constitutes an unconditional debt "owing or accruing" to the debtor from the garnishee, so as to render it liable to attachment at the suit of the creditor in satisfaction or reduction of the judgment debt. The garnishee in *Bagley* v. *Winsome* [1952] 2 Q.B. 236 was a bank, and the judgment debtor was its customer. In regard to money at a bank it has long been established that if the money is on current account it may be garnished. As Sir Raymond Evershed, M.R., points out, the availability of garnishee proceedings in such a case at one time seemed threatened by the conclusion reached by the Court of Appeal in considering in another context the relationship of banker and customer in *Joachimson* v. *Swiss Bank Corpn.* [1921] 3 K.B. 110. For that case decides that money lying at a bank even on current account is not due to the customer until demand is made. But the court had itself indicated in *Joachimson* the solution to the garnishee problem, declaring that the service of a garnishee summons or order *nisi* on a bank was to be taken as equivalent to a demand.

When the money is not on current account, but has been placed by the customer on deposit at the bank, something more than a demand is commonly required before the bank will allow the money to be withdrawn. The basic additional condition usually takes the form of a requirement of a period of notice, and if this were the only condition and if it could be proved by the creditor that the notice had been given and had expired without withdrawal having been made, there would seem to be no reason in principle why the money on deposit could not be garnished just as if it were held on current account.

But other conditions are commonly imposed by the bank's terms of business. In *Bagley's* case personal application by the customer was required, and the deposit book was to be produced at the time of withdrawal. The substantial contention of the judgment creditor was that, if service of a garnishee summons could operate in place of a demand, as indicated in *Joachimson's* case, there was no reason why it should not also be taken as satisfying any other conditions precedent to the accrual of the debt from the bank such as those which apply in the case of a deposit account. So to hold, said the Court of Appeal, in rejecting this contention, would be to put a judgment creditor in a better position as against the garnishee than the judgment debtor himself.

It followed that, since the debtor had not personally attended at the bank with the deposit book, the obligation of the bank towards him had not become a debt owing or accruing to the debtor within the meaning of Ord. 27, r. 1, of the County Court Rules (which corresponds in this respect with R.S.C., Ord. 45, r. 1), and was not a proper subject of garnishee proceedings. The Master of the Rolls noted that this result seemed to accord with the view generally prevailing on the subject. As his lordship remarked, the judgment creditor is not without a remedy, for application could be made for the appointment of a receiver by way of equitable execution, and that seems to be the appropriate method of reaching sums on deposit at a bank to the credit of a judgment debtor.

J. F. J.

The Board of Trade announce that from 1st September, 1952, the responsibility for the Bankruptcy District of the County Courts of Reading, Banbury, Newbury and Oxford is transferred from the Official Receiver (Mr. C. T. Newman) at London Suburban Office South to the Official Receiver (Mr. W. J. W. Hill), London Suburban Office North. Mr. W. H. Haigh has been appointed Assistant Official Receiver for those courts.

Mr. W. G. Thornton, assistant solicitor to Middlesbrough Corporation, was married on 10th September to Miss Mary Louise Wilson, of Bradford.

Mr. J. E. Heap, solicitor, of Bradford, was married on 13th September to Miss Marguerite Wheatcroft Brown, of Shipley.

A Conveyancer's Diary

DRAWING A WILL

THIS is a somewhat grandiose title to put at the head of an article of this length, more fit to introduce the stately admonitions of a Jarman than to lift the curtain on the few desultory observations that I have to offer; but having warned my readers not to expect too much, I can say that what follows is the result of much experience. In the last few months I have seen three or four wills of family men disposing of estates of middling size, each of which seemed to me to be badly drawn, or badly adapted for the circumstances with which it was intended to deal. To some extent the deficiencies of these wills were due, it appears to me, to the lack of a really comprehensive selection of modern precedents of wills. The Statutory Will Forms, published as part of the property legislation of 1925, were intended to satisfy this need, and before the recent war they did to a large extent do so; but economic conditions have changed so much since 1939 that many of the purely dispositive provisions of those forms are quite out of date. As for their administrative provisions, this kind of conveyancing shorthand is, undoubtedly, convenient and a great time-saver, but I feel that the executors should be able to see the whole of their duties set out for them in one document, and this is another reason why these forms do not, in general, appeal to me.

The usual order in which the various parts of a will appear is: appointment of executors, legacies and devises, disposition of residue, powers, any other special provisions; and it is in this order that I will take up the points I have in mind to make. First, therefore, as to legacies and devises. It is extraordinary how often a will contains no gift of personal chattels. If the testator leaves a widow, such a gift is at the least highly desirable, for if it is omitted the widow usually expresses a desire to have some of, if not all, the personal chattels, and that means a sale and the consequent diminution of the financial provision which the testator has made for her. Testators sometimes desire to subject small legacies to trusts and gifts over; this is seldom convenient nowadays, and if the legacy is to an infant a provision that it is contingent on the legatee attaining a given age (an age under twenty-one is sometimes worth consideration) will often meet a testator's desires. As a legacy to an infant legatee can often be expended to most advantage in assisting his or her education, either directly or in some indirect way such as paying for school holidays spent abroad, a provision enabling the executor at discretion to pay the legacy to an infant legatee's parent or guardian is also a convenient provision to suggest to a testator. If substantial legacies are given to relations, e.g., nephews and nieces, a substitutional gift in favour of the primary legatee's children if the legatee should predecease the time of payment (whatever that may be) may also be suggested: substitutional provisions of this kind regularly appear in the forms of gifts of residue to children, but they are just as applicable wherever a strictly stirpital division of the testator's bounty is desired, and if the testator's intentions are probed, it may well turn out that he regards each nephew and niece, or if some other class is chosen, each member of that class, as a *stirps* for this purpose.

Under this head falls to be considered the proper provision which is to be made regarding the testator's residence—a vital matter in the case of a family man—and, if he has one, his business. There are so many different ways of disposing of these items of property, and their distribution depends so much on individual circumstances, that there is only one matter relative thereto to which I can draw attention within the limits of this article: if the testator has a lease of residential accommodation (e.g., a flat), a direct devise thereof to the widow may enable her to take advantage of the Rent Restrictions Acts, whereas subjection of the lease to a trust may deprive the testator's family of that protection. The comparative rarity of specific devises of leaseholds is due, I suppose, to a feeling that, unlike freeholds, leaseholds at a rack-rent are not generally of any value. If so, I think that this is a mistake for which the families of testators must often pay heavily.

Gifts of residue fall into two classes: direct gifts and provisions for a trust for sale of residue followed by dispositions of the proceeds. Unless it is intended to give the residue or part thereof on trust, the latter has no advantage over the former, except, on occasion, incidentally, as where a form of trust for sale is used which, *inter alia*, excludes the application of an inconvenient rule of administration, such as the rule in *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295. But if a full form of trust for sale of residue is used, it is much easier to read and understand—a point of particular importance for the executor—if it is broken up, so far as possible, into numbered or lettered paragraphs and sub-paragraphs, and if each of those paragraphs or sub-paragraphs is kept as short as possible. Provisions for the investment of the proceeds of sale of the testator's residue are, for example, sometimes inserted immediately after, and in the same sentence as, the direction to convert, and where these provisions can be expressed in a few words they do little harm in such a place; but if any but the simplest direction to invest in trustee investments is to be included in the will at all, it is much better to direct investment merely in the paragraph dealing primarily with the conversion of the residue, and to add a separate clause directing the method of investment in the later part of the will appropriate to powers. As to the disposition of the residue, if this is given in whole or in part to any person or persons by name for an absolute interest, the possibility of lapse must be considered. This is often overlooked, with unfortunate results.

The powers which are conferred upon executors and trustees are legion, and their selection will always depend on circumstances. But in the case of a family man, in addition to powers of investment (which I think should always be drawn so as to give the trustees the widest possible discretion in this regard), every will should contain a power extending the personal representative's statutory powers of appropriation by making it unnecessary for him to obtain the beneficiary's consent to the proposed appropriation. With stamp duties at their present rates, the omission of this provision can be very expensive to the beneficiaries. As for maintenance and advancement, the statutory powers are, in the normal case, perfectly adequate, and these powers are, of course, applicable whether mentioned in the will or not. But as a reminder to executors and trustees, a clause expressly stating that those powers are applicable is, I think, a useful provision. The ideal, from this point of view, would be to set out the statutory powers in full, but as they are somewhat long this is impracticable. An additional power to apply capital, at discretion, for the advancement or benefit of any, or a named, beneficiary is sometimes justified by special circumstances.

Even more than in the case of powers, there is practically no limit to the special provisions which a testator may wish to have inserted in his will. But some special provisions

seem to me to have something verging on a general utility. In this category I put provisions excluding hotchpot, and provisions making any benefit conferred by the will contingent on the beneficiary surviving the testator for a given period, e.g., one month. In the absence of such a provision the *commorientes* rule now applicable by reason of s. 184 of the Law of Property Act, 1925, often has most undesirable effects from the point of view of estate duty, and I think that a provision of this kind should be included in every draft will for the consideration of the testator as a matter of common form.

"A B C"

Landlord and Tenant Notebook

"OLD STYLE"

MICHAELMAS QUARTER, 1952, is now drawing to its close. The Michaelmas Quarter is the longest of the four, but 200 years ago it was the shortest ever; so it is perhaps fitting to recall, in this article, some litigation indirectly occasioned by the Calendar (New Style) Act, 1750, and the amending Calendar Act, 1751.

It was that legislation which brought our calendar into harmony with the one long adopted by most of Europe and Scotland. Its sponsors undoubtedly did their best to prevent any loss resulting from the change; but in spite of their efforts, there were riots to the cry of "Give us back our eleven days," for the provision in s. 1 of the 1750 Act "that the natural day following the said 2nd day of September, 1752, shall be called, reckoned and accounted to be the 14th day of September, omitting for that time only the eleven intermediate nominal days of the common calendar" was bound to bewilder and infuriate some citizens. Nor did the provisions designed to protect landlords and tenants meet with wholehearted approval: s. 6 of the 1750 Act enacted that nothing should extend, or be construed to extend or accelerate or anticipate the time of payment of any rent or rents payable by virtue of any custom, usage, lease, etc.; or the time of the commencement, expiration or determination of any lease or demise of any lands, tenements or hereditaments; or of the accepting, surrendering or delivering up of any such lands, etc.; or the commencement, expiration or determination of any annuity or rent, or of any grant for any term of years of what nature or kind soever, by virtue or in consequence of any such deed, writing, contract or agreement . . ." The result was, and is, that many yearly tenancies run from "Old Michaelmas" or "Old Ladyday"; and many of us will have noticed that, even long after agricultural land (which was primarily affected) has become a "built-up area," the old style quarter days sometimes persist.

The actual transition to the New Calendar in 1752 does not appear to have produced any authorities, and most of the decisions concerned later grants and illustrate the law relating to the admissibility of parol evidence of custom. In *Furley d. Canterbury* (*Mayor, etc.*) v. *Wood* (1794), 1 Esp. 198, a notice, dated 3rd March, 1793, called upon the defendant to quit at "Michaelmas next following", not specifying any calendar date, and he professed not to know whether he was expected to go on 29th September or on 10th October. The plaintiff was allowed to adduce evidence that throughout Kent "to hold from Michaelmas" was understood to mean ". . . from Old Michaelmas," and the letting having been in fact an Old Michaelmas letting, the notice to quit was held to be regular and effective for 10th October.

Doe d. Matthewson v. *Wrightman* (1801), 4 Esp. 5, is of particular interest as having laid down the principle that a tenant who disputes the date alleged for the commencement of his tenancy must say when it did commence. For in this case the notice to quit was in the alternative: "on the 25th day of March, or the 8th day of April next ensuing": and Lord Kenyon, C.J., held that it was good as long as it was received six months before the end of the tenancy.

The defendant in *Doe d. Hinde* v. *Vince* (1809), 2 Camp. 256, was in much the same position as the defendant in *Furley d. Canterbury* (*Mayor, etc.*) v. *Wood*, *supra*, but appears to have relied on the effect of legislation rather than on alleged embarrassment occasioned by absence of calendar date. The notice to quit told him to deliver up "on Michaelmas day the next," and evidence showed that entry had been at Old Michaelmas, whereupon the defence argued that the notice expired on 29th September (by virtue of the Calendar (New Style) Act, 1750) and was void accordingly. But it was held that there could be "conventual" as well as statutory quarter-days and that the notice was therefore effective for Old Michaelmas Day.

But in *Doe d. Spicer* v. *Lea* (1809), 11 East 312, it was held that this could not apply to an instrument under seal. Land had been leased in 1780 for a term of thirteen years: "to hold from the Feast of St. Michael . . ." The defendant was, in fact, one who had originally been sub-tenant, and had acquired a tenancy by holding over; nevertheless, when he was given on a 24th March a notice to quit "on 11th October, Old Michaelmas Day," it was held that no extrinsic evidence could be admitted to explain that the Feast of St. Michael had fallen on some date different from the date prescribed by Act of Parliament. (It would be interesting to know how, in view of the much lessened respect for instruments under seal (see 96 SOL. J. 99) the point would be decided to-day.) It was also laid down that the naming of a wrong date was fatal though the notice would be in time for the right date; a principle later referred to with approval by A. L. Smith, L.J., in *Sidebotham* v. *Holland* [1895] 1 Q.B. 378 (C.A.), the leading case on "general words."

In the eighteen-twenties we had *Doe d. Hall* v. *Benson* (1821), 4 B. & Ald. 588, followed by and in *Doe d. Peters* v. *Hopkinson* (1823), 2 L.J. (o.s.) K.B. 11. In the former, premises had been let in December at £3 3s. a year "from the following Lady Day"; on 9th October, 1819, the landlord gave notice to quit "on Lady Day following"; parol evidence was admitted to show that Old Ladyday was meant. In *Doe d. Peters* v. *Hopkinson* the defendants had agreed on 21st March, 1821, to "take the farm now occupied by X when the said X is able to quit at Ladyday next, when the said J.H. [the defendant] is to enter"; it was proved that he was in fact let into possession on 6th April; rent receipts were dated "Lady-Day" and "Michaelmas Day" *simpliciter*, but, notice to quit having been given on 8th October, 1822, to expire on 6th April, 1823, the landlord's agent was allowed to testify that the landlord had "always treated" the rent as due at Old Ladyday and Old Michaelmas Day, and the notice was upheld.

But in *Smith* v. *Walton* (1832), 1 M. & Sc. 380, a replevin action, the tenant scored a success because the landlord's avowry had alleged rent to have been due for the year "ending Martinmas, to wit 23rd November" (the property was in Yorkshire), and the jury found that the letting had in fact been an "Old Martinmas" one (11th November). An attempt was made to get the court to reject the "to wit, 23rd November" as mere surplusage, but it was held that what

applied to a deed (*Doe d. Spicer* v. *Lea*) must apply to a plea, and the statement in the avowry must be taken to mean New Martinmas.

The decision in *Doe d. Spicer* v. *Lea* was, however, distinguished in *Doe d. Willis* v. *Perrin* (1840), 9 C. & P. 467, in which the issue turned on the validity of a notice to quit and deliver up "on Saint Michaelmas Day next," which had been served on a 1st April; it was held that this notice would be good either for Old or for New Michaelmas Day; that *prima facie* it effected determination on the latter, but (there being no lease under seal) evidence could be called to show that the tenancy ran from the former.

By then, some ninety years having elapsed since the Gregorian replaced the Julian calendar, it was to be expected that people would at least appreciate the importance of the change; we probably all know the sort of person who, whenever Summer Time comes into force, is apt to qualify any reference to the time by "of course, it is really, etc.," but who usually abandons the practice after about a month.

But one more decision, in which the parish officers of Biggleswade were the plaintiffs, was to find its way into the reports: *Hogg and Another* v. *Norris and Berrington* (1860), 2 F. & F. 246. They sued for possession of parish lands on the strength of some rather vague evidence about the tenancy alleged, and in reliance on a notice, served on a 5th April, to quit "at Michaelmas," which, they said, meant Old Michaelmas. In support of the last allegation they tendered evidence that such was the custom of the country; which evidence Erle, C.J., refused to admit, having regard to the presumption that "Michaelmas" meant 29th September. They were then, however, able to adduce direct evidence showing that the letting had been an Old Michaelmas one, and so scraped home. Erle, C.J.'s ruling is at variance with that given in *Furley d. Canterbury (Mayor, etc.)* v. *Wood*, but this may be ascribed to the fact that the statute had been in force over a century, with a consequential strengthening of the presumption.

R. B.

PRACTICAL CONVEYANCING—LII

ASSIGNMENT OF LEASEHOLD HOUSES AGAIN

SOME difficulties arising on transactions affecting a leasehold house where the rent is more than two-thirds of the rateable value were discussed *ante*, p. 525. Such houses are usually within the Rent Restrictions Acts, so that the prohibition of the taking of a premium on assignment contained in the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (2), is operative. It will be remembered that one suggestion (originally made by Mr. R. E. Megarry) was that, where an assignee of a lease cannot obtain a premium on making a further assignment, he should make a sub-lease at less than two-thirds of the rateable value. The sub-tenancy so created would not be within the Rent Restrictions Acts, and a premium could be taken on the grant which might include the capitalised difference between the rents.

A number of readers have commented on this suggestion. The substance of most comments is that one would hesitate before advising an underlessee to pay a premium in addition to rent less than that paid under the superior lease. The danger is that the lessee may default in payment of the rent under the head lease, with the result that the sub-lessee may have to pay that higher rent to preserve his own interest. This difficulty undoubtedly exists. The only comment the present writer would make is that the problem facing the present holder of a lease such as we are discussing is such that a solution not altogether satisfactory may be better than accepting the prohibition on taking a premium; consequently, he may well be prepared to sub-lease on such favourable terms that the sub-lessee may be willing to take the risk mentioned. If the capitalised difference between the two rents is small the terms of the sub-lease may be such that there would be no hardship to the sub-lessee if he had to pay the full rent under the head lease.

Another correspondent has pointed out that on the expiration of the head lease the sub-lessee will not be protected by the Rent Restrictions Acts against the head lessor. This seems to be the case, but if the head lease has many years to run it is not a serious objection. The suggestion is then made that the sub-lease could be followed by an assignment by the lessee to the sub-lessee of the head lease, which would result in the merger of the two terms. The sub-lessee would then have obtained the security of tenure he desires and the lessee would have divested himself of the term in return for an adequate premium. No doubt a payment by the lessee to the sub-lessee would be appropriate in return for the assumption by the sub-lessee of the liability for the higher rent under the lease. Such a payment would not appear to be a breach of the terms of the 1949 Act. One is tempted to ask whether the two stages of sub-lease and assignment might not be combined; this would certainly be dangerous, as the transaction might be construed as an assignment at a premium contrary to the 1949 Act.

Comments of another reader have indicated a different approach to the problem which, if it can be adopted, is more satisfactory. His solution was to persuade the head lessor to surrender the existing term and to grant a new term at a rent less than two-thirds of the rateable value. The new term was not then subject to the Rent Restrictions Acts and so could be assigned or mortgaged freely. This procedure is dependent on the co-operation of the head lessor and his willingness to take into account the value of the existing lease (which is surrendered) in fixing the premium on the grant of the new lease. In present circumstances many lessors would be pleased to enter into such an arrangement, which would bring them an immediate premium; it may be that in some cases the result of negotiations would be the sale to the lessee of the freehold on favourable terms.

The conclusion appears to be that, even if the difficulties cannot always be avoided completely, with some care it will often be possible to assist an unfortunate lessee to dispose of his interest on reasonable terms.

J. G. S.

DIVORCE REGISTRY (LAW SOCIETY CAUSES)

REVISED ARRANGEMENTS

The Divorce Registry (Law Society Causes Section) at present accommodated at the Royal Courts of Justice (West Wing) will cease to exist as a separate unit with effect from the 1st day of October, 1952. On and after that date all matrimonial causes conducted by salaried solicitors of The Law Society will proceed in the Divorce Registry, Somerset House, Strand, London, W.C.2, and will be listed for trial in the normal Cause List.

WESTMINSTER CATHEDRAL

A Votive Mass of the Holy Ghost (The Red Mass), will be celebrated on Wednesday, 1st October, 1952 (the opening of the Michaelmas Law Term), at 11.30 a.m., in the presence of His Eminence Cardinal Griffin, Archbishop of Westminster. Celebrant: The Rt. Reverend Monsignor Charles L. H. Duchemin. Counsel will robe in the Chapter Room at the Cathedral. The seats behind counsel will be reserved for solicitors. Will those desirous of attending please inform the Hon. Secretary, Society of our Lady of Good Counsel, 6 Maiden Lane, W.C.2, so that an adequate number of seats may be reserved.

HERE AND THERE

OPEN THE INN

It's still vacation time, so, in lively anticipation of future vacations, let us further consider the law and practice relating to innkeepers. Their duties to travellers are clear and peremptory, but the question whether or not they have in fact performed them depends on that misty, drifting abstraction so beloved of English jurists, the "reasonable," which, curiously enough, coincides so little with the clear and well defined processes of logic. Now what is the object of an inn? What is it *for*? It exists that the casual traveller finding himself, probably unexpectedly, in a strange place may find a table at which to feed and a pillow whereon to lay his head. An inn is not a residential boarding house or a luncheon club. No doubt in those fantastic localities which, in the season of migration, annually suck the urban overspill in one vast tidal wave, it is "reasonable" that innkeeping practice should adapt itself to the abnormal. But when that is said, the question still remains why in any village or town in France it is normal to be able to eat your fill and lie at least in moderate comfort, while in England it has become normal, on one excuse or another, to be turned away. The excuse, of course (when the innkeeper so much as feels it necessary to make an excuse), is current difficulties, but a lawyer exists to overcome legal difficulties and a doctor to overcome medical difficulties (that's what they're *for*). A tight-rope walker exists professionally for the purpose of walking the tight-rope and a lion tamer for the purpose of taming lions, both callings of no little complexity. Similarly, the innkeeper exists for the purpose of overcoming the difficulties of hospitality—that's what *he's* for and, however great the difficulties, it is not "unreasonable" to require him to overcome them. At no inn in France would you ever be told: "You're too early," "You're too late," "You ought to have booked in advance," "There's not enough business to make it worth our while"; and there's no special reason why they should be current coin here.

WHAT *IS* THE MATTER?

Now, it isn't just through one hole that the spirit of English hospitality has leaked away and several of the holes link up. The peculiar licensing legislation of opening and closing, with its background of Puritanism on the one hand and social solicitude over the working hours of barmen on the other, really has produced a frame of mind to which it appears almost as one of the laws of nature that all the duties of hospitality should cease to operate during certain fixed hours. Again, the almost total extinction of the "free house" has meant virtually the disappearance of the small inn where a man and his wife dispense a simple hospitality. Such houses would be an almost complete answer to excuses based on the catering wages legislation. I meditated on this only a few weeks ago in the not particularly memorable little town (or large village) of Belle Isle en Terre, where the landlord of the irreproachable inn served in person large delicious meals cooked by his wife, the two of them managing without or with outside help according to the season of the year. Nor have I anything but praise for his hotel accommodation: perfectly simple but as clean and comfortable as you please. I would link it with the inn of the fat, jolly landlord at Châteauneuf en Favre who cooks deliciously in his own kitchen, employs the most cheerful and efficient waitress-cum-chambermaid, and says that the more staff you have the worse the work is done. The family-run hotel is the answer but even the brewers, who have turned most of the smaller inns into mere taps for their liquor, could do quite a lot to right the wrong they've done. So many are the applications for their tied tenancies that it would be the easiest thing in the world for them to select only candidates who would positively undertake to do their duty as innkeepers (each in his degree) and not merely as barmen. Another thing that has tripped up English hospitality is the striving after grandeur. Hardly an innkeeper feels that he can serve meals without the trappings and general decoration of a private dining room. Let those who find it answers a demand, carry on, but the traveller would far, far rather have the simplest service than no service at all. I think of those jolly little inns in France where the floor boards are bare, but the table, covered only with a gay check cloth and transparent plastic, is always laden. Never there do you meet the double-edged defeatism that if there is little custom it's not worth while providing a service, and if there's a lot the resources are inadequate to cope with it. That, I am afraid, is also related to the conviction that a small profit isn't worth making and a small living isn't worth organising. Just now one of the commonest forms of national laziness is to be unwilling to do any job of work unless the returns are going to be out of all proportion to your efforts. Finally, there has grown up the quite extraordinary superstition that food doesn't matter, or, at any rate, doesn't matter enough to be worth taking trouble about. Maybe this is a psychological compensation for the state we've got ourselves into by letting food take second place to factories. But even the factories have given us the can and the tin opener, and even on those the innkeeper could make an infinitely better showing than he does. So what shall we do about it? The individual traveller is at an enormous disadvantage in enforcing his legal rights, what with the expenses, the time to be expended in a strange locality and the difficulty of collecting enough evidence to repel or forestall all the plausible excuses the innkeeper might concoct to show that he had not, "in the circumstances," acted "unreasonably." Therefore I hereby propose the establishment of a Society for the Prosecution of Inhospitable Innkeepers, to do the spadework. It's a long road that has no turning and it's time the insulted traveller came to a turn.

RICHARD ROE.

REVIEWS

Carver's Carriage of Goods by Sea. Ninth Edition. By RAOUL P. COLINVAUX, of Gray's Inn, Barrister-at-Law. 1952. London: Stevens & Sons, Ltd. £6 10s. net.

The present edition of Carver is an admirable combination of the well-known text-book which for more than fifty years has been a recognised authority on the subject, and a treatment of the modern aspects of that constantly growing branch of law. Thanks to the thoroughness and skill of the present editor, the modern aspects of the work are emphasised and the value of the work is thereby greatly increased. Not only is the modern case law considered in great detail but many American cases are quoted. In justification of that new feature, the author rightly observes: "Certain standard clauses in British shipping contracts—such as the Jason and Both-to-Blame Collision clauses—are only understandable by reference to American decisions which conflict with our own, while other earlier decisions of the American courts are now almost a part of our body of law." The Carriage of Goods by Sea Act, 1924, is now fully integrated into the work and valuable appendices deal with the application of the Hague Rules in the British Commonwealth and foreign countries. The editor rightly sets out in full in another appendix the American Carriage of Goods by Sea Act, 1936, which superseded the Harter Act, 1893. The only objection which can be raised to this excellent work is that it attempts to cover too much; there is a good

deal treated which properly pertains to the sale of goods, insurance law and other related topics. The answer to that objection is, of course, that if those matters were omitted, the work would cease to be "Carver." A minor misprint occurs on p. 790 in the treatment of *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63, where the reference is to "legal principles" and not to "legal principals."

The work is attractively produced and, in its present form, will be of great value to counsel, solicitors and managers of shipping offices.

Consequential Fire Loss Insurance in the United Kingdom and Eire. First Edition. By LYNDESAY M. CURRIE, Associate of the Chartered Insurance Institute. 1952. London: Gee & Co. (Publishers), Ltd. 21s. net.

There are few books on consequential loss insurance and they are mostly outlines. This present work is comprehensive and meets the need of those who should be informed on an increasingly important subject. It is still not sufficiently recognised that the consequences of fire (or other perils) on profit earning may be more damaging than the actual loss of material but it is rapidly becoming the rule for a business of any size to effect insurance cover, and often nowadays the familiar claim for loss of building, plant or stock is accompanied by a claim for consequential loss of profit. The arrangement of the insurance in the terms best suited to a particular business and the negotiation of claims require a special knowledge which Mr. Currie has acquired largely from practical experience and which he now offers in print in an efficient and interesting manner.

Hart's Introduction to the Law of Local Government and Administration. Fifth Edition. By W. O. HART, C.M.G., B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law. 1952. London: Butterworth & Co. (Publishers), Ltd. 38s. 6d. net.

There is little new material in this edition although the author has succeeded in mentioning a number of recent statutes, summarising their provisions where necessary, without adding to the length of the book. He has done this by shortening explanatory passages skilfully so that nothing valuable is lost. Incidentally he has rearranged a few paragraphs in order to adopt a more satisfactory classification. A small omission is that of the Town and Country Planning (Development by Local Planning Authorities) Regulations, 1951 (from p. 530). The effect of these regulations is that a local planning authority which desires to develop its own land can now usually give itself planning permission.

In his preface the author notes that the edition has been prepared on the eve of further legislative changes (examples of changes effective before publication can be found in the Housing Act, 1952). This state of affairs is inevitable, but it leads one to ask that future editions shall state the date up to which the text has been amended. For the present edition this date would appear to be the end of 1951, but a clear statement in a prominent position would assist readers (including candidates for The Law Society's Final Examination who must take care to study more recent legislation).

The main use of the book is by students preparing for The Law Society Final, and as the book is prescribed for their use its contents determine the scope of the questions set by the examiners. In general the contents of the book seem very well chosen for this purpose, but one is inclined to ask whether Pt. II (which deals in appreciable detail with central control over local authorities) is well designed. This part occupies 160 pages and so appears out of proportion to Pt. III, which compresses a sketch of local government services into 324 pages. Although one may agree that fundamentals must be explained adequately even at the expense of detail of practical importance, one must insist that a book prescribed by The Law Society should aim at equipping students to meet practical problems after they have qualified. In practice one rarely meets any problem on which Pt. II of Hart gives material assistance, whereas there is scarcely a page in Pt. III which does not contain brief statements of rules of the greatest importance in the every-day work of local authorities. The author must find great difficulty in the task he performs so efficiently of keeping the length of the book within a reasonable limit, and if he could shorten some of the chapters in Pt. II he would, no doubt, find adequate new material for insertion. (A topic not now mentioned which is of practical importance and is not dealt with adequately in other students' books is the registration of local land charges.) Opinions on the point must differ, but examples of matters which, in our opinion, do not justify such extensive treatment are parliamentary procedure (p. 286 *et seq.*) and delegated legislation (p. 299 *et seq.*), neither of which are essentially matters of local government law, and judicial control (p. 358 *et seq.*), which, however important in theory, is rarely invoked in practice. It is suggested, therefore, that the admirable but minor amendments made to the text in this edition might be followed by a radical revision of Pt. II in the next edition.

The County Court Practice, 1952. By His Honour Judge EDGAR DALE, a member of the Standing Committee for framing Rules, Mr. Registrar BRUCE HUMFREY, D.L., J.P., of the Croydon County Court Group, and R. C. L. GREGORY, LL.B., of Gray's Inn, Barrister-at-Law, and of the Lord Chancellor's Department. 1952. London: Butterworth & Co. (Publishers), Ltd.; Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. £3 15s. net.

A number of new statutes are dealt with in Pt. 2 of the new Practice, including the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951 (with the rules made under it), the Leasehold Property (Temporary Provisions) Act, 1951, the Maintenance Orders Act, 1950, the Rag Flock and Other Filling Materials Act, 1951, the Tithe Act, 1951, and the Rivers (Prevention of Pollution) Act, 1951. Some of the material in Pt. 1 has been rearranged and rewritten for easy reference. The "Green Book" remains, as ever, indispensable.

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Agriculture (Calculation of Value for Compensation) Amendment (No. 2) Regulations, 1952. (S.I. 1952 No. 1617.) 5d.

Boot and Shoe Repairing Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1952. (S.I. 1952 No. 1620.) 6d.

Control of Hemp (Amendment) Order, 1952. (S.I. 1952 No. 1648.)

Cremation (Scotland) Regulations, 1952. (S.I. 1952 No. 1639 (S. 84).) 5d.

Fats, Cheese and Tea (Rationing) (Amendment No. 3) Order, 1952. (S.I. 1952 No. 1618.)

Fire Services (Conditions of Service) (Scotland) Amendment Regulations, 1952. (S.I. 1952 No. 1640 (S. 85).)

Fire Services (Ranks and Conditions of Service) (No. 2) Regulations, 1952. (S.I. 1952 No. 1644.)

Fur Wages Council (Great Britain) Wages Regulation Order, 1952. (S.I. 1952 No. 1615.) 11d.

Laundry Wages Council (Great Britain) Wages Regulation Order, 1952. (S.I. 1952 No. 1621.) 8d.

London Traffic (Parking Places) Consolidation (Amendment) (No. 2) Regulations, 1952. (S.I. 1952 No. 1613.) 5d.

Marlow Water Order, 1952. (S.I. 1952 No. 1642.) 5d.

Meat Products (Amendment) Order, 1952. (S.I. 1952 No. 1619.)

Motor Vehicles (Third-Party Risks Deposits) Rules, 1952. (S.I. 1952 No. 1616.) 5d.

National Insurance (Industrial Injuries) (Benefit) Amendment Regulations, 1952. (S.I. 1952 No. 1633.)

Retail Food Trades Wages Council (Scotland) Wages Regulation (Amendment) Order, 1952. (S.I. 1952 No. 1627.) 6d.

Retail Furnishing and Allied Trades Wages Council (Great Britain) Wages Regulation Order, 1952. (S.I. 1952 No. 1635.) 11d.

Retail Newsagency, Tobacco and Confectionery Trades Wages Council (England and Wales) Wages Regulation (Amendment) Order, 1952. (S.I. 1952 No. 1626.) 6d.

Retail Newsagency, Tobacco and Confectionery Trades Wages Council (Scotland) Wages Regulation Order, 1952. (S.I. 1952 No. 1625.) 8d.

Stopping up of Highways (London) (No. 16) Order, 1952. (S.I. 1952 No. 1629.)

Stopping up of Highways (Nottinghamshire) (No. 1) Order, 1952. (S.I. 1952 No. 1628.)

Sugar Confectionery and Food Preserving Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1952. (S.I. 1952 No. 1636.) 5d.

Transferred Undertakings (Pensions of Employees) (No. 2) Regulations, 1952. (S.I. 1952 No. 1612.) 8d.

Wages Regulation (Licensed Non-residential Establishment) Order, 1952. (S.I. 1952 No. 1634.) 8d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 102-103 Fetter Lane, E.C.4, and contain the name and address of the subscriber, and a stamped addressed envelope.

Life Policy under Married Women's Property Act, 1882—Divorce—Variation of Trusts

Q. A in 1936 took out a life policy on his own life issued pursuant to the Married Women's Property Act, 1882, the sum insured to be paid to his wife B, if living at the date of maturity, otherwise to A's executors, administrators or assigns. Subsequently B successfully petitioned for a dissolution of the marriage. Both A and B have since remarried and A does not wish to keep on foot an insurance for B. What steps can A take (*a*) to substitute his second wife's name for that of B in the policy, (*b*) to provide for the policy moneys to be paid to his personal representatives, or (*c*) to ensure payment to himself of the surrender value should he decide to surrender the policy? It should perhaps be mentioned that A is of the opinion that B would not voluntarily join in any assignment.

A. A should apply to the court under s. 29 of the Matrimonial Causes Act, 1950, for the post-nuptial settlement constituted by the life policy to be varied by the revocation of the existing trusts and the substitution of new trusts on the lines desired by A. For cases where this has been done, see *Gulbenkian* v. *Gulbenkian* [1927] P. 237; *Lort-Williams* v. *Lort-Williams* [1951] 2 T.L.R. 200.

Land Tax—Compulsory Redemption—Apportionment and Liability on Grant of Lease

Q. We are acting for an intending tenant, who is proposing to rent a farm-house for a period of thirty years at a nominal rent which will create a beneficial occupation under the Income Tax Act. The whole farm, including the farm-house, is subject to a land tax in excess of 10s. per annum. The landlord's solicitors propose to state in the lease that the land tax attributable to the farm-house to be rented by our client shall be fixed at a sum less than 10s. per annum and that the residue of the tax shall be charged on the rest of the farm. Will such an apportionment be binding on the authorities or is there any risk that they may increase the assessment of land tax upon the farm-house and call upon our client, as he is a tenant for a period in excess of twenty-one years, to redeem the same?

A. The apportionment referred to in s. 40 (6) of the Finance Act, 1949, is an official apportionment made by the Inland Revenue on application, and the informal apportionment made by the lessor in the lease will not be binding on them in arriving at the official figures. The land tax will, however, become compulsorily redeemable in consequence of the grant of the lease (see the Finance Act, 1949, s. 39 (1) (*b*) (ii)) and this will be the responsibility of the lessor under s. 40 (2) of the Act by reason of his being the owner of the relevant interest as defined by s. 44 (1) (*e*) and becoming liable for the redemption moneys payable in respect of the part leased. Even if the official apportionment is at a figure of less than 10s. per annum exoneration will not ensue, since under s. 38 (3) an apportionment made after the end of the land tax year 1949–50 does not have that effect.

Will—Devise Subject to Option to Third Party to Purchase—Destination of Rents Pending Exercise

Q. X, who died in 1951, left a property to Y, subject to an option for Z to purchase it within six months of the decease for £690. The property was tenanted at his decease and Z has given notice that he will exercise his option. Is Y entitled to the rents of the property (subject to bearing outgoings) between date of death and exercise of option or date of payment of the £690 or are these due to be received and borne by the estate?

A. We do not see anything in the present case to displace the general rule (Jarman on Wills, 7th ed., vol. II, p. 918) that a specific devisee, where the devise is immediate, takes the rents and profits as from the death of the testator, and we are accordingly of the opinion that Y is entitled to the rents and profits between the death of X and the date of completion of the sale. Support for this view is to be found in *Andrew* v. *Andrew* (1875), 1 Ch. D. 410, where it was held that where a devisee's interest was liable to be divested upon the happening of a contingency the devisee was entitled to the rents and profits until the contingency occurred. In the present case Y would appear entitled to his devise, and therefore to the rents and profits, until the option is exercised. Between the exercise of the option and the completion of the sale the ordinary rules as between vendor and purchaser would appear to apply, at least so far as the rents are concerned.

Company Articles—Provision that New Shares be Offered to Members—Whether Necessary to Except Executors, etc.

Q. In a company whose articles are about to be altered, the following article has been suggested: "Unless otherwise determined by the company in general meeting, any ordinary shares for the time being unissued and any new shares from time to time to be created shall, before they are issued, be offered to the members in proportion, as nearly as may be, to the number of shares held by them." The company's accountant has suggested that the following words should be inserted at the end of such clause: "Except persons registered as members but holding shares as executors of a deceased shareholder, or as trustee in bankruptcy of a former shareholder or committee in lunacy of a shareholder." The accountant maintains that executors of a deceased shareholder would receive any additional shares in their individual capacity, as the company is not concerned with any trust. The solicitors maintain that while the new shares would be vested in the executors without reference to the trust, they would hold the shares upon trust for the deceased shareholder's estate, and any attempt to obtain the shares beneficially would constitute a breach of trust and, in consequence, the article as drawn does not need alteration. Is the accountant, or are the solicitors, correct in their opinion?

A. It appears to us that the accountant has been influenced in his view by the rule that executors who accept new shares offered to them in that capacity will be personally liable on the shares as between themselves and the company (*Re Leeds Banking Co.; Fearnside and Dean's Case* (1866), L.R. 1 Ch. 231). This rule, however, applies only as between the executors and the company, and while it is true that the company would not be affected with notice of any trust we do not think that this would afford ground for saying that the executors would therefore be able to obtain the shares beneficially. The proposed new article does not, in our opinion, require qualification in the manner suggested.

Mortgage of Leasehold — Purchase by Mortgagor of Freehold Reversion—Declaration of Merger—Subsequent Further Charge of Leasehold Interest—Position of Mortgagee

Q. A, in 1949, purchased Blackacre for an estate in fee simple in possession, and in 1950 granted a lease of the property to B

for a term of seventy years at an annual rent of £5. On the day following the date of the lease, B charged his leasehold interest to a building society by way of legal mortgage to secure the sum of money therein mentioned, repayment of the principal and interest being made in accordance with the usual procedure. The freehold reversion in course of time devolved upon C, who in 1951 sold his interest therein to B. The freehold reversion was conveyed to B "in fee simple, to the intent that the term, granted by the lease, shall forthwith merge and be extinguished in the fee simple thereof." The legal charge had not been discharged prior to the conveyance to B, and, in fact, on the day following the date of the conveyance B executed a further charge in favour of the society, expressed to be supplemental to the legal charge, whereby a further sum of £90 was advanced to B upon the security of the property "described and comprised" in the legal charge. Is the reversion in fact merged in the freehold in view of the declaration contained in the conveyance to B? What is the society's position under the legal charge and further charge? Can the society exercise its power of sale in the event of a default by B in the mortgage instalments, and, if so, can it make a valid assurance of (*a*) the freehold or (*b*) the term of years?

A. Under the rules of equity (which now prevail: Law of Property Act, 1925, s. 185) merger depends upon intention, and intention is a question of fact to be determined by any admissible evidence. As to this, the declaration in the conveyance of the freehold reversion is not conclusive, and the subsequent acts of the party concerned and in particular his duty to prevent merger are relevant. In the present case the further charge of the leasehold interest is clearly inconsistent with the declaration of merger, and the subsistence of the original mortgage imposed a duty to prevent merger; and we are of opinion that they are quite sufficient to negative the declaration of intention to merge. Accordingly we consider that no merger has occurred and the building society can exercise their power of sale, upon default, in respect of the leasehold interest.

NOTES AND NEWS

Honours and Appointments

Mr. TREVOR KEIGHLEY, solicitor, of Halifax, has been appointed assistant legal adviser with Messrs. Brooke, Bond & Co., Ltd.

Wills and Bequests

Mr. R. H. Beaumont, a former county court registrar, of Southwell, Notts, left £56,248 (£55,711 net).

Mr. G. K. Buckley, solicitor, of Preston, left £26,945 (£26,810 net).

Mr. J. M. Dickinson, solicitor, of Blackpool, left £16,668 (£7,800 net).

Mr. Dudley Evans, solicitor, of Wimpole Street, London, W.1, left £26,014 (£17,950 net).

Mr. W. B. Hadfield, solicitor, of Glossop, left £28,872.

Mr. C. G. MacPherson, solicitor, of Cheriton, near Alresford, left £23,070 (£23,005 net.).

Mr. H. P. Pierron, solicitor, of Kensington, left £11,650 (£10,409 net). He left £500 to the senior magistrate at West London Magistrates' Court to establish there a fund or memorial to bear his name; £2 for each year of service to all employees; and after some legacies and bequests the residue to The Law Society.

Mr. R. G. Rose, solicitor, of Bedford, left £29,711 (£26,082 net).

Mr. A. R. Thomas, solicitor, of Helston, Cornwall, left £44,719 (£44,498 net).

Mr. James Allon Tucker, solicitor, of Bath, left £11,462 (£11,212 net).

Mr. G. H. Turner, solicitor and theatre director, of Thames Ditton, Surrey, left £48,948 (£47,164 net).

OBITUARY

MR. A. NIELD

Mr. Albert Nield, retired solicitor, formerly of Brown Street, Manchester, has died at his home at Rhyl, aged 62. He was admitted in 1924.

MR. W. A. PARRY

Mr. William Arthur Parry, solicitor, of Worcester, has died at the age of 82. He was admitted in 1926.

SIR W. B. THOMAS

Sir William Bruce Thomas, Q.C., president of the Transport Tribunal from 1932 (when it was the Railway Rates tribunal) until his retirement two years ago, died on 5th September, aged 74. He was at one time assistant solicitor to the Great Northern Railway, but abandoned his career as a solicitor in 1911 and was called by the Middle Temple in 1912.

Mr. K. A. THOMSON

Mr. Knowles Arthur Thomson, retired solicitor, formerly of the Temple, has died at the age of 51. Admitted in 1925, he retired to take up farming at Dulverton, Somerset, two years ago.

MR. J. T. WOLFE

The death has taken place of Mr. Jasper T. Wolfe, solicitor, of Skebereen, County Cork, who had been President of the Incorporated Law Society of Ireland in 1941, a member of the Dail, and Crown Solicitor for the West Riding of Cork and Cork City.

SOCIETIES

UNITED LAW SOCIETY

The annual general meeting of the United Law Society was held in Gray's Inn Common Room at 7.15 p.m. on Monday, 26th May, 1952. The Chairman was Mr. H. Wentworth Pritchard. The following were elected as officers of the Society for the year 1952–53: Chairman, J. R. Bracewell; Vice-Chairman, A. Garfitt; Treasurer, J. C. Knight; Secretary, D. N. Keating; Assistant Secretary, P. E. Bridge; Reporter, R. V. Cowles; Members of the Committee, M. J. H. Beazley, T. P. Burton, E. O. Jackson; Auditors, O. T. Hill and R. M. Costain.

The Society commences its next session on 13th October, 1952, and the session continues until the following May. Meetings are held weekly on Mondays at 7.15 p.m. in Gray's Inn Common Room. Barristers, solicitors, bar students, articled clerks and matriculated students of any university studying for a law school or for a degree in law, or who have passed the examination in a law school or the examination qualifying them for a law degree are eligible as members and are very welcome, whether or not they have had any previous experience in debating. Guests also are very welcome at the debates, which had an average attendance last session of twenty-four. The entrance fee is 10s. and the annual subscription is also 10s. Ladies or gentlemen wishing to become members should communicate either with the Secretary, Mr. D. N. Keating, of 11 Kings Bench Walk, Temple, E.C.4 (Central 2484), or with the Assistant Secretary, Mr. P. E. Bridge, of 62 London Wall, London, E.C.2 (Monarch 9282).

The SOLICITORS' MANAGING CLERKS' ASSOCIATION has again arranged for the coming winter a series of classes for junior law clerks. They will be held in the Lord Chief Justice's Court, at the Royal Courts of Justice, Strand, W.C.2, on each Monday evening at 6.15 p.m., commencing on Monday, 6th October next. Applications for further particulars and for tickets (the issue of which may have to be limited) should be made to the Hon. Secretary at the offices of the Association, Maltravers House, Arundel Street, Strand, W.C.2.

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